***United States Court of Appeals***

***for the Second Circuit***

# INTERVENOR'S BRIEF

# 75-4021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS & DISTRIBUTORS, NO. 75-4021
WARNER BROTHERS et al., NO. 75-4024
SANDY FRANK PROGRAM SALES, INC., NO. 75-4025
WESTINGHOUSE BROADCASTING COMPANY, INC., NO. 75-4026
COLUMBIA BROADCASTING SYSTEM, INC., NO. 75-4036
Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

AMERICAN BROADCASTING COMPANIES, INC.
COLUMBIA BROADCASTING SYSTEM, INC.
NATIONAL BROADCASTING COMPANY, INC.
WESTINGHOUSE BROADCASTING COMPANY, INC.
WARNER BROTHERS, INC., et al.
NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS, et al.
MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
Intervenors.

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# BRIEF FOR INTERVENOR NATIONAL BROADCASTING COMPANY, INC., ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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March 3, 1975

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## STATEMENT OF THE CASE

This appeal involves review of the Order of the Federal Communications Commission (herein "Commission") set forth in a Second Report and Order: In Re Matter of Consideration of the Operation of, and Possible Changes in Prime Time Access Rule, § 73.658(k) of the Commission's Rules, FCC No. 75-67, released January 17, 1975 (herein "Second Report and Order").[1]

Since the detailed history of this proceeding is set forth fully in the Second Report and Order, and is not disputed, it will not be repeated here.

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1. For convenience the Prime Time Access Rule set forth in this Order will be referred to as PTAR III. The Commission had also adopted earlier versions of this Rule. The first is referred to as PTAR I. It is set forth in Prime Time Access Rule, 18 RR 2d 1825 (1970), modified in part on reconsideration, 19 RR 2d 1869 (1970). The second version of the Rule is referred to as PTAR II. This is set forth in Prime Time Access Rule, 29 RR 2d 643 (1974).

## ARGUMENT

### Introduction

In 1970, the Federal Communications Commission promulgated PTAR I. That Rule was challenged on constitutional and regulatory grounds. This Court rejected those challenges and upheld PTAR I. Mt. Mansfield Television, Inc. v. Federal Communications Commission, 442 F.2d 470 (2d Cir. 1971) (herein "Mt. Mansfield").

Since the Rule was an experimental one, various parties applied to the Commission for changes in PTAR I. As a result the Commission adopted PTAR II which made substantial changes in PTAR I. However, PTAR II never became effective and its merits were not passed on judicially. It was sent back to the Commission because of a defect found in its effective date, with the suggestion that the Commission reconsider its decision in the light of some of the problems raised by the Court. NAITPD v. FCC, 502 F.2d 249 (2d Cir. 1974) (herein "NAITPD I"). The Commission did so and considered all of the matters suggested to it by this Court.

The result of the Commission's reexamination was a decision to retain PTAR I, upheld in Mt. Mansfield. Further, based on the experience it now had with the Rule, the Commission adopted certain circumscribed exemptions. These exceptions lifted restrictions on stations from utilizing network and off-network sources during prime time hours for a specialized area of programming -- public affairs, documentaries and children's programs. These are categories in which the Commission found both a dearth of such programs and a public interest need for them. The Commission's emphasis on expanded programming in these areas is not novel. It has long been a focus of Commission policy, well known in the broadcasting industry.

There can be no doubt that had these particular exceptions been included in PTAR I (which itself contained not dissimilar exceptions) the result in Mt. Mansfield would have been precisely the same.

While NBC did not originally favor the Rule, after the decision in Mt. Mansfield NBC accepted the fact that the basic constitutional and regulatory arguments had been settled. NBC recognizes also that in an experimental rule,

administrative modifications from time to time may be expected. We submit that the administrative process should be given an opportunity to function. Perpetuation of uncertainty and flux can only frustrate a fair test of the Rule and serves neither the viewing public nor the broadcasting industry.

Although petitioners seek to buttress their challenges with recasting of old arguments, with charts and exhibits considered and rejected by the Commission, and with considerable colorful rhetoric, the arguments presented for delaying or overturning PTAR III or any part of it are a replay of Mt. Mansfield or involve insubstantial points which cannot justify an invalidation of the Commission's Rule.

## I. THERE IS NO CONSTITUTIONAL DEFECT IN THE PTAR III EXCEPTIONS

In Mt. Mansfield Television, Inc. v. Federal Communications Commission, supra, PTAR I was challenged on First Amendment grounds. The Court explicitly rejected that challenge.

PTAR III is essentially the same as PTAR I, except that it permits an exemption in an area clearly affected with the public interest - children's programs, public affairs and documentary programs.

Petitioners challenge these exemptions making two so-called constitutional arguments. The first is that by creating an exemption for public affairs, documentaries and children's programs, the Commission has violated the First Amendment guarantees of free speech. The second is that the exemptions for children's, public affairs and documentary programs are constitutionally "void for vagueness."

Little time need be spent on these arguments. They are essentially not new - they were either explicitly or implicitly rejected by Mt. Mansfield, and nothing has transpired since Mt. Mansfield to warrant a different decision.

Since Mt. Mansfield, NBC has proceeded on the basis

that whatever constitutional issues were presented by the prime time access rule were resolved by that case. No one involved in Mt. Mansfield chose to seek Supreme Court review. The Mt. Mansfield ruling is the law which has governed the Commission and the industry in prime time access consideration.

### A. The Exemptions in PTAR III Do Not Violate Anyone's Freedom of Speech

This Court in Mt. Mansfield held that PTAR I did not violate the First Amendment guarantees of free speech. PTAR III retains the original Rule as affirmed by this Court and allows only a limited exception in the public interest area based on the Commission's experience with the operation of the Rule. The exception permits station licensees to broadcast public affairs, documentaries and children's programs during access time.

As a factual matter, this basic issue is not new. PTAR I also contained exceptions. Expressly excluded from PTAR I were "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events, and political broadcasts by legally qualified candidates for public office."[1]

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1. The Commission in its decision on reconsideration in PTAR I also had noted that further exemptions might be needed. 19 RR 2d 1869, Par. 36.

Section 73.658(k)(a)). And in its Report and Order adopting the Rule, the Commission announced that it would grant requests for waiver of the Rule to stations wishing to carry network news programs at 7 P.M. on condition that they also carry a continuous one-hour local news program from 6 to 7 PM. PTAR I, 18 RR 2d 1825, 1843 fn 36 (1970).[1] None of these exceptions was held to be unconstitutional in Mt. Mansfield. It is difficult to see how the limited exceptions in PTAR III could now create a First Amendment infirmity when no such infirmity was found in PTAR I.

It is also of significance that the original proponent of the Rule, Westinghouse, which now attacks the exceptions, had itself argued for exceptions not unlike some of those in PTAR III. Thus, Westinghouse's own proposal called for exceptions for:

-- "programs of public significance, or of a national public interest;"

-- certain live programs of "important sporting, cultural and political events;"

-- "news programs, including news, historical and controversial documentary type programs;"

-- "Such exceptions as the Commission may grant in the public interest upon request of a

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1. The waiver also was extended to cover situations where stations provided a full hour of local news or public affairs programming before the network news. 22 RR 2d 1682, 1683 (1971).

licensee." Order for Oral Argument and To Invite Further Comment, Docket 12782, Appendix A, R.R. Current Service *** 53:46, 48 (33 F.R. 14470, FCC Mimeo. No. 68-959, September 20, 1968).

CBS, likewise, although now challenging the exceptions, has been a prime mover in requesting the news and public affairs waivers which are forerunners of the PTAR III exceptions.[1] In the current proceeding, too, CBS filed comments "favoring a permanent exemption both for the type of network programs now covered by the [one-time only news and public affairs] waiver and for those network news and public affairs programs which are part of a regular series." Prime Time Access Rule, 26 RR 2d 1701 (1973) (emphasis in original). As the Commission summarized the various comments:

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1. Even before the Rule became effective, CBS petitioned the Commission to grant a waiver to permit its affiliates to carry two regular CBS network news and public affairs series in prime time as exceptions to the Rule. Prime Time Access Rule, 32 FCC 2d 55, 23 RR 2d 77 (1971). At that time, CBS stated its belief "that the prime time access rule should not apply to news and public affairs programs." 23 RR 2d at 78. CBS also made the first request for waiver of the prime time rule to permit stations to carry all one-time only news and public affairs broadcasts in prime time as exceptions to the Rule, and has consistently repeated that request as each previous waiver period expired. Prime Time Access Rule, 23 RR 2d 77 (1971); 25 RR 2d 542 (1972); 25 RR 2d 593 (1972); 26 RR 2d 1701 (1973); 28 RR 2d 365 (1973); 31 RR 2d 409 (1974).

> "The three networks and some individual licensees vigorously supported a total exemption for news and public affairs or, at least, the present blanket waiver. The longest discussion was that of CBS, urging that a general exemption is required (to avoid having to pass on any specific material, which would present First Amendment problems) and that this whole restriction flies in the face of a number of cases stressing the importance of freedom of expression, with Mount Mansfield not really to the contrary because that decision (like the rule) dealt chiefly with entertainment programming. CBS claimed that this material, because of its high cost and relatively little return, has been and will be left largely to the networks to provide, certainly as to 'hard news' and most documentaries, and any restriction has a chilling effect on the wide dissemination of material from diverse sources. Having to do this on 'the network's own time' would be a real burden and not provide the 'breathing space' required for such broadcast activities." Prime Time Access Rule, 29 RR 2d 643, 689 (1974).

Thus, the propriety and desirability of such exceptions and waivers have been emphasized repeatedly by broadcasters and indeed by the same parties who now attack the exceptions formulated here. And never was there any serious contention that granting those exceptions involved any constitutional infirmity.

To better evaluate the criticisms of the PTAR III exceptions now raised on this appeal, it is important to examine what the exceptions do and do not do.

Here is what the exemptions do:

-- PTAR I imposed restraints upon stations obtaining programs from networks for 14 half-hours of prime time each week. PTAR III continues those restraints but relaxes them for three narrow categories in which the Commission finds a need for additional program sources - public affairs, documentaries and children's programs.

-- PTAR III's exceptions in substantial measure codify the practice under PTAR I of granting waivers for certain programs now covered by the exceptions.

-- PTAR III recognizes the public interest in making available certain specialized types of programs to the public.

-- PTAR III narrowly circumscribes the exceptions to make sure that they will not be abused or utilized to remove the opportunities created by PTAR I and now continued in PTAR III.

Here is what the exceptions in PTAR III do <u>not</u> do:

-- They do <u>not</u> require any station to broadcast any program, of any type.

-- They do <u>not</u> prevent any station from broad-

casting any program in the area dealt with by the exceptions.

-- They do not substitute the Commission's programming judgment for the licensees' judgments as to the programs to be broadcast.[1]

Stated simply, PTAR I (which always had certain exceptions) restrained stations from selecting network and off network programs for broadcast for a certain amount of time each evening. Programs from other sources were permitted. PTAR III essentially preserves PTAR I, except that the restraint of PTAR I was lifted as to children's, public affairs and documentary programs. Stations now are free to choose such programs from network and off network sources, as well as other sources, without restriction during prime time. One would indeed be hard pressed to find in this slight relaxation of the restraints of PTAR I, a constitutional issue, let alone a constitutional violation.

While various petitioners argue First Amendment rights with vehemence, a scrutiny of their briefs fails to

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1. By Commission rule, stations need not clear time for network programs unless they choose to do so, and even after agreeing to take the network program they may reject or refuse it if they reasonably believe it to be unsatisfactory or unsuitable, or contrary to the public interest, or may substitute a program which in the station's opinion is of greater local or national importance. Section 73.658 (d) and (e).

reveal that any of their own freedom of speech rights will be infringed by the exceptions in PTAR III. Station licensees will now have additional sources for public affairs, documentaries and children's programs.[1] Networks will, within limits, have the opportunity to make available such programs. Producers, too, will be able to offer such programs, although they have not in practice done so, which is why the Commission felt the need to enlarge sources for public affairs, documentaries and children's programs. As for the public, it is quite obvious that the Commission's exceptions do not infringe on the public's rights by increasing the potential availability of public affairs, documentaries and children's programs; if anything, the contrary obtains.

The First Amendment contentions are simply not tenable, nor do they become so by the vigor with which they are argued or the rhetoric in which they are couched.

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1. Opponents of PTAR III characterize the Rule as establishing categories which are "approved" or "disapproved," or "favored" or "disfavored." Such characterization of the exceptions is misleading. Stations have the same ability to present entertainment, news, sports, documentary, public affairs, religious, or any other types of programming that they had under PTAR I. The only change is that as to the excepted program types, stations wishing to broadcast this type of programming during access time now will have it available from network and off-network sources, as well as from all other sources. No First Amendment value is threatened by this change.

The cases cited by petitioners all deal with traditional First Amendment and equal protection violations where particular groups are singled out for discriminatory and unreasonable treatment. Typical of such cases is Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972), which petitioners stress in their briefs.

In Mosley, the Court struck down an ordinance that prohibited all picketing except peaceful labor picketing in the area of a school. The City defended the ordinance as necessary to prevent school disruption, but this rationale clearly was without merit. "Peaceful" labor picketing was deemed not disruptive by the City, but no showing at all was made that "peaceful" non-labor picketing would be any more disruptive. Id. at 100-101. There was thus no reasonable justification for restriction on non-labor picketing.

That case is not pertinent here. Here, the Commission has not sought by its exceptions to exclude anyone from providing children's programs, public affairs or documentary programs. Nor does the Commission mandate anyone to offer such programs. This is non-discriminatory treatment, not discriminatory treatment as in Mosley.

Furthermore, in Mosley the distinction in the ordinance was found to be without any reasonable justification.

That is hardly the case here. The reasonableness of the exceptions at issue have been underscored by the Commission's experience in a variety of proceedings, none of which has ever been set aside for unconstitutionality.

For example, in its Children's Television Report and Policy Statement, 31 RR 2d 1231 (1974), the Commission clarified the responsibilities of broadcasters with respect to programming designed for the child audience. It indicated that it expected further response as to children's programming on the part of many broadcasters. The Commission's exceptions in PTAR III neither adds to nor detracts from the substantive content of this Policy Statement. They simply provide another means for stations to obtain programming designed for children during an important part of the day that stations can determine whether or not they wish to carry that children's programming or some other programming of whatever type or source at that time.

The same holds true of the exception for public affairs and documentary programs. The Commission has from time to time indicated that television stations have a responsibility to carry programs serving local community needs and problems, and required the filing of an extensive showing of their performance at license renewal time. Renewal of Broadcast Licenses, 27 RR 2d 553 (1973). The construction permit

and license renewal application forms adopted in that proceeding, as did the forms previously in use by the Commission, require broadcasters to report on the amounts and percentages of news, public affairs and other non-entertainment programming they have carried during the past license period and propose to carry during the coming license period. Here, too, regardless of the substantive standards which past and future Commission and Court decisions may establish with respect to the responsibility of broadcasters concerning news and public affairs programming, the exceptions adopted in PTAR III do not impose any substantive requirements. Rather, the exceptions provide another means for stations to obtain public affairs and documentary programming during an important part of the broadcast day, but imposes no obligation on stations to carry any specific programming of any type or source.[1]

There is likewise no basis for petitioners' contention that the exceptions are unconstitutional because they may result in some diminution of the total access time provided by PTAR I. PTAR I was an experimental rule which sought

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1. In this connection, the Second Report and Order makes the express point that such programming may be locally-produced, or syndicated, or network. 32 RR 2d at 722.

to enlarge prime time access for certain sources, particularly independent producers. But it is a [illegible] to say that the Commission thereby constitutionally p[illegible]ded itself from allowing any other sources to offer public affairs, documentary and children's programs during part of that time.

The experimental nature of the Rule has been emphasized both by this Court and the Commission, which perforce means that reasonable experiments were to be expected. The changes in PTAR I promulgated by PTAR III are limited modifications based on the Commission's experience under the Rule and serving the public interest. Nothing in these modifications infringes on the freedom of speech guaranteed by the First Amendment.

B. The Exceptions in PTAR III Are Not "Void for Vagueness"

Petitioners, knowledgeable members of the industry, argue that the provisions of PTAR III dealing with children's programs, public affairs programs and documentaries are so vague as to require the Court to void them as a matter of constitutional law.

To undo a governmental statute or regulation at any time on "void for vagueness" grounds imposes a heavy burden on the challenger. United States v. National Dairy Corp., 372 U.S. 29, 32 (1963), and cases cited therein. And where the challenged terms are those used daily in the industry, are well known to the challengers, and have been the subject of numerous other regulations and proceedings, the challenge borders on the frivolous. Omaechevarria v. Idaho, 246 U.S. 343, 348 (1918). Indeed, one has only to read petitioners' briefs to appreciate that they understand the exceptions very well indeed. They may not like them -- but that, of course, is not an issue of constitutional dimension.

The challengers try to postulate various grey areas where some difficult programming judgments may have to be made. But that is always the case where definitions must be translated into operation. Definitions of classes or categories or exceptions in legislation or administrative rules

do not have to be stated with the precision of a telephone tariff to withstand constitutional voiding. Ultimately, perhaps, particularly with an experimental rule, some further definitional gloss may emerge. But that circumstance hardly necessitates a ruling that the regulation, as now drafted, is void on its face. See Thorne v. Housing Authority of the City of Durham, 393 U.S. 268, 276 (1969); Chrysler Corp. v. Tofany, 419 F.2d 499, 511-12 (2d Cir. 1969).

Petitioners also argue that a wrong judgment as to a program may result in penalties, loss of licenses or other dire consequences. But there is no reason to believe that the Commission will impose Draconian penalties for honest misjudgments. Such reductio ad absurdum speculation does not warrant a declaration of unconstitutionality.

1. The first exception in PTAR III alleged to be void for vagueness is the term "children's programs."

Regulatory interest in children's programs, of course, involves novel, pioneering concept for television. As noted, the Commission has recently concluded an extensive study of children's programming in Docket No. 19142 and this is referred to in the Commission's order in PTAR III.[1] The considerable

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1. Second Report and Order, at 18.

discussion of the subject there provides particularly recent and useful guidance concerning the meaning of children's programs.

In any event, the Commission adequately has defined children's programs on the face of the PTAR III order. Children's programs are defined as those "primarily designed for preschool and elementary school children, ages 2 to 12, taking into account their immaturity and special needs." Second Report and Order, at 18. This term is not only not new in the industry; licensees are already required by Commission rule to apply this definition to their programming. For more than one year, all licensees have been required, as part of their license renewal applications (Form 303, Section IV-B, Question 6), to "give a brief description of programs, program segments or program series aired during the license period that were directed to children twelve years old and under" (Emphasis supplied), (Renewal of Broadcast Licenses, 27 RR 2d 553, 613, 639 (1973)). No licensee or network or program supplier appealed the adoption of that requirement for "vagueness" or any other reason, nor has any of them felt it necessary to request a declaratory ruling from the Commission to guide them in interpreting the requirement to define their programming in those terms.

It is not necessary to elaborate the point that far less specific definitions by legislative and rule-making bodies have been upheld time after time as not being so vague as to require a constitutional voiding. "Impossible standards of specificity are not required .... The test is whether the language conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practice." Jordan v. DeGeorge, 341 U.S. 223, 231-32 (1951); See, e.g., United States v. National Dairy Products Corp., 372 U.S. 29 (1963). This rule applies equally here.

Oddly, the petitioners who argue vagueness, also complain that the Commission has cited the Disney program as an example of a program that fits into the children's program category, as distinguished from other offerings which do not. It is difficult to understand the process of reasoning whereby, on the one hand the Commission is attacked as being "vague," and on the other hand, it is attacked for illustrating the category with a specific, well understood example.

The citation to the Disney series is, of course, useful. Its traditional appeal to children is well known; its characteristics are well understood. It frequently involves young children, animals or pets as the primary characteristics; it is the only current prime time network series program that also makes use of animation.

The contention that the Disney program is not a children's program because some demographic ratings show that the program is also watched by adults in the family is disingenuous. (See Brief for Petitioner CBS, Inc. at p. 20 n. 19). Obviously, adults often share in activities designed for children, whether at Disneyland, a children's movie or a Disney TV program. In fact, Disney has been in the top three programs viewed by children 2 to 11 for at least the past seven television seasons.

In short, the Commission has not been vague at all in its definition of children's programming. Certainly the definitions here, particularly with the long industry experience in this area, cannot conceivably be said to be so vague as to require constitutional invalidation.

2. Petitoners also claim that PTAR III's references to public affairs and documentary programs are so void as to contain a constitutional infirmity.

This is an untenable ascertion. The term "public affairs" program has long been defined and used by the Commission and the broadcast industry. Every licensee for years has had to record, as such, every public affairs program

broadcast in his daily program logs. Section 73.670(d)(1), Note 1, of the Commission's Rules. For years, every applicant for a construction permit or license renewal has had to classify his past and/or proposed programming into categories, one of which is "public affairs." See Renewal of Broadcast Licenses, 27 RR 2d 553, 585 et seq , 738 et. seq. (1973) for the most recent over-all amendment to the application form. No one in the industry has complained of constitutional inability to understand this term.[1]

Likewise, documentary programs are thoroughly defined as (1) non-fictional, (2) educational or informational, (3) not including contests and (4) consisting of only 50% or less entertainment material where the program concerns the visual entertainment arts.

The various quibbles with this definition certainly do not rise to constitutional dimension. For example, an attack is made on the distinction between fictional and non-fictional programs. It is wholly inaccurate to view this as

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1. As demonstrated in its numerous requests for waiver of the prime time access rule for one-time only news and public affairs programs, CBS has never had difficulty with that term. Nor have Westinghouse or NAITPD (or anyone else), ever claimed "vagueness" in opposing that waiver. Interestingly, as discussed earlier, it was both CBS and Westinghouse who proposed that all such public affairs programs be excepted from the Rule.

a decision by the Commission to "favor" non-fictional programs.[1] The argument that there are many meritorious, fictional programs therefore is beside the point. Programs of that type already are in abundant supply; the Commission has determined that non-fictional programs are not. Accordingly, the Commission has provided by means of an exception to the limitations imposed by PTAR I that these non-fictional programs may be provided regardless of source of program supply.[2]

Such quibbles would occur, no matter how the Commission tries to refine its decision. The definition that rules out any judgmental factors whatever is undoubtedly yet to be written. Clearly, the Commission's definitional effort here is well within permissible constitutional limits.

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1. Much has been made of distinguishing Lassie from non-fictional animal programs. But the distinction is easy to understand. Lassie, like Francis The Talking Mule or Mr. Ed, merely is a typical entertainment program in which an animal happens to play a primary role. This latter fact does not distinguish it from the great run of entertainment programs readily available to viewers.

2. Likewise, the exception does not encompass "contests" not because they are less favored, but because there are numerous game shows already available. So, too, it clearly is within the Commission's discretion to determine that programs containing more than 50% entertainment should be considered entertainment programs -- also readily available to viewers -- rather than documentaries.

## II. THE COMMISSION DID NOT ACT UNREASONABLY IN ADOPTING PTAR III OR ITS EXCEPTIONS

In Mt. Mansfield, PTAR I was attacked on various regulatory as well as constitutional grounds. All such challenges were rejected by this Court.

Although PTAR III is essentially the same as PTAR I with certain exceptions referred to earlier, petitioners again attack the regulatory justification for PTAR III. These attacks hardly differ in concept or even in form from those rejected in Mt. Mansfield. There can be no doubt that had the changes made by PTAR III been originally included in PTAR I, Mt. Mansfield would have reached precisely the same conclusion.

NBC did not origianlly favor the Rule. However, the Rule was adopted and upheld by this Court. As emphasized earlier (Pp. 3-4, supra), NBC submits that the public interest would be better served by going forward with PTAR III and giving the administrative process the opportunity to function.

Although petitioners argue the regulatory points at length, there seems little need for elaborate reply in view of the principle affirmed by this Court and others that the Commission is "an expert agency entrusted with administration of a dynamic industry ... entitled to latitude

in coping with new developments in that industry." Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966); see, e.g., Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519, 524 (D.C. Cir. 1972); Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 225 (D.C. Cir. 1967).

The Commission's discretion of course applies not only to the initial formulation of a rule, but to creating exceptions to a rule, and to determining the propriety of waivers under a rule. As discussed, the prime time access rule was considered experimental from the outset, and it is particularly true that "the Commission is to be accorded substantial latitude in the continuing administration of a rule such as is here involved, where trial and error is to some extent inevitable." James S. Rivers, Inc. (WJAZ) v. FCC, 351 F.2d 194, 196 n.3 (D.C. Cir. 1965). Likewise, Courts must give wide berth "to the necessarily 'pragmatic' nature of the Commission's approach to each requested waiver." Id., citing Guinan v. FCC, 111 U.S. App. D.C. 371, 375 297 F.2d 782, 786 (1961).

Under these principles which limit the scope of judicial review of the Commission's action, the Commission's decisions (1) essentially to continue the basic experiment

started by PTAR I, and (2) to provide certain limited exceptions, are both legal and appropriate.

A. The Basic Rule

Although PTAR I was upheld as valid regulation in Mt. Mansfield, the major film studios again have attacked the Rule and have urged that this Court must require the Commission to repeal it. Essentially, the film studios claim that the Rule has not provided sufficient program diversity. They also raise the wholly specious argument that the Rule -- which removes from the networks the opportunity to program a significant amount of prime time -- somehow has increased "network dominance."

These arguments were presented to the Commission, which rejected them as being discredited by the facts. Because those findings are based on substantial evidence before the Commission, and are not "arbitrary and capricious," they must be upheld by this Court. See, e.g., National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 204 (D.C. Cir. 1969), cert. denied 397 U.S. 922 (1970).

The film studios argue that the prime time access rule has not increased program diversity as anticipated. The

real thrust of the film studios' argument is that the type of programming frequently presented in access time is programming which they generally do not produce. Thus a considerable portion of the film studios' brief is spent disparaging what they categorize as "game shows."[1]

The Commission explicitly responded to these arguments, concluding that on the evidence before it and in light of the uncertain situation created by litigation concerning the Rule, an adequate amount of diversity had occurred. The Commission found that in addition to game shows, other types of programs, such as animal shows and musical and variety programs, were represented in access time. Second Report and Order, at 12.

At this point, therefore, the Commission has found that the original prime time access rule has shown sufficient indicia of potential benefits to support the Commission's narrow discretionary judgment that, with certain limited modifications, the rule should continue in operation at this time. It is of course open to the Commission later to conclude that the potential detriments outweigh the potential benefits, if that should eventuate.

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1. The studios' characterization of game shows appears to include informational quiz shows, celebrity programs, audience-participation programs and programs combining these elements.

The ultimate test of the Rule will not come until this litigation is terminated, and the Rule has been in effect for a reasonable period of time. We submit that, considering the changes that already have taken place in the industry because of the Rule, it is now in the public interest to allow the Commission's experiment to continue.

The major film studios also contend that the prime time access rule is unsuccessful as a regulatory matter because it has increased alleged "network dominance." The contentions made by the film studios in support of this argument were raised before the Commission. The Commission evaluated the facts before it and rejected the film studios' position. Second Report and Order, at 9-10; Appendix C, at 10-17. The factual basis for the Commission's decision is contained in the decision itself and, inter alia, in NBC's Reply Comments, which deal "with these points at length." Id. at Appendix C, at 13. The NBC Reply Comments are provided as an Exhibit to this Brief.

For present purposes, it suffices to summarize here the points made at length in the materials cited which fully support the Commission's discretion.

Initially, the contention that "network dominance" has been increased is rather odd at best, in light of the

obvious fact that the prime time access rule limits networks' ability to provide programs. In the face of this large obstacle to their "dominance" argument, the film studios offer alleged indirect effects which they claim accrue to the benefit of the networks. These points are completely lacking in factual support.[1]

-- First, as to the alleged increase in network revenues from advertisers in prime time, the increase in prime time cost of network advertising per thousand homes (CPM) (the standard measure of advertising cost) appears to have merely paralleled the rate of inflation. This increase is similar to the trend in daytime CPM, where the prime time access rule clearly would have no effect. (NBC Reply Comments, at 11-19).

-- Second, license fees paid to program suppliers have evidenced at least an equal increase (NBC

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1. Even were the film studios' arguments factually supportable, there is, of course, no rule or law that states that any FCC action which also results in a benefit to a television network is therefore illegal. The Commission, in formulating the Rule, never intended a general attack on network programming, 20 RR 2d 1687, 1706 (1970), and virtually from the beginning of television has endorsed the importance of the network service. E.g., ABC Paramount merger case, 8 RR 541, 595 (1952); see, In the Matter of Amendment of § 3.658(b) and (3) of the Commission's Rules, 25 RR 1651, 1669 (1963).

Reply Comments, at 8-11).

-- Third, clearance of a syndicated program by network-owned stations neither is essential to the success of such a program, nor does it insure the program's continued viability. (NBC Reply Comments, at 19-25).

-- Fourth, the total three network entertainment schedule, only a very small percentage of which actually is produced by the networks themselves (under 10%), is just a small part of the viewing choices available to the public from stations in the top 50 markets. (NBC Reply Comments, at 25-28).

Even cursory review of the factual material provided in NBC's Reply Comments makes clear that the Commission's decision to reject the film studios' "dominance" argument was fully supported by the evidence. Any attack on the Commission's refusal to repeal the prime time access rule which is premised on this argument must therefore be rejected.

B. The Challenged Exceptions

Certain petitioners, most of whom endorse the general legality of the prime time access rule, have, however, challenged certain exceptions which the Commission has added in

PTAR III to permit stations to broadcast during access time network or off-network children's programs, documentary and public affairs programs.

There is no valid basis for any such challenge, once the basic legality of the prime time access rule itself was determined in Mt. Mansfield, supra. The challenged PTAR III exceptions are of sufficiently narrow scope so as to be wholly consistent with the Commission's essential aim under any version of the prime time access rule. In addition, the exceptions are similar to exceptions already existing under PTAR I and to waivers which the Commission has granted as a matter of administrative practice from the beginning of its implementation of the prime time access rule.

### 1. The Limited Nature and Scope of the Exceptions

PTAR III is, unlike PTAR II, very similar to the original prime time access rule upheld by this Court in Mt. Mansfield. Although petitioners would have the Court believe that PTAR III has created enormous changes from PTAR I, the opposite is the case.

PTAR I prevented stations from accepting for broadcast network and off-network programs for more than three of the four nightly prime time hours. Thus two half-hours were

set aside each day -- 14 half-hours each week -- for "access" programming.

PTAR II decreased the access time to allow stations to utilize network and off-network programming in eight of the 14 half-hours made exclusively available for access programming under PTAR I. Under PTAR II, a 60 percent reduction of access time thus would have been accomplished.

PTAR III, by contrast, maintains the 14 half-hours of PTAR I. Stations are subject to the same basic restrictions in the amount of network and off-network programs they may accept for broadcast ir prime time.

The only distinction between PTAR I and PTAR III relevant here is that under PTAR III, stations may accept for broadcast network or off-network programs of three clearly defined types -- children's programs, documentaries and public affairs programs -- without such programs counting against the three prime time hours of network or off-network programs which may be broadcast in a night.

The petitioners who challenge these limited changes from PTAR I attempt to create the impression that all of access time will be swallowed up by these exceptions. But the history of programming of this type, both under and apart from the

prime time access rule, shows that such an occurrence is unlikely as a practical matter. Moreover, the Commission explicitly has stated that it will not permit the use of the challenged exceptions in a manner which will be inconsistent with the operation of the prime time access rule, which essentially has been preserved by the Commission in its original form.

Petitioners would lead the Court to believe that all or most of the 14 half-hour access periods will be filled with programs coming within the PTAR III exceptions. This ignores reality. The Commission has recognized the obvious fact that much of the programming covered by the exceptions is "expensive" but "not commercially lucrative." Prime Time Access Rule, 29 RR 2d 643, 698 (1974). Stated simply, most programming of the excepted type does not attract sufficient audience, especially compared to the costs of production, to make it feasible for networks and others to offer, or for stations to accept for broadcast large quantities of this programming.[1]

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1. Stations are completely free to accept or reject network programming of this type, Second Report and Order, at 20, in order to broadcast currently offered or newly developed access fare. Although a network would prefer that stations accept for broadcast a series of documentary offerings, certain stations well might decide that in their market, an access show of the same or a different type would be more preferable, and those stations would be free to reject the network program.

In any event, to protect the benefits of PTAR I, the Commission has put strict limits on the extent to which access time may be utilized for excepted programming. Thus the Commission stated:

> "We expect the networks, and licensees in their acceptance of network programs and use of off-network material to keep such programming to the minimum consistent with their public interest judgments as to what will best serve the interests of the public generally." Second Report and Order, at 20 (Emphasis added).[1]

The Commission's belief that this admonition is sufficient to circumscribe the possible incursion of excessive network or off-network programming into access time under the PTAR III exceptions clearly is reasonable as established and accepted procedure of regulatory agencies. For the most part, as we will illustrate below, the PTAR III exceptions have been and are available by waiver under PTAR I. There is not the least suggestion that waivers of this type have been abused in the past, and there is no reason to believe that such abuse will suddenly develop under PTAR III.

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1. Although we, of course, cannot speak for others, NBC has made clear that it has no other plans to utilize the PTAR III exceptions other than to schedule the Disney program at 7 p.m. in the Sunday access period. Affidavit of Benjamin D. Raub, ¶ 6.

## 2. The History of Exceptions and Waivers of This Type

The limited change which PTAR III has made in the prime time access rule is even more evident when considered in light of the exceptions included in PTAR I and the waivers which the FCC has provided since PTAR became effective.

As we have noted previously, from the beginning PTAR I, as upheld in Mt. Mansfield, contained exceptions for certain news and political programs.[1]

Moreover, the Commission granted a waiver for network special news and public affairs programs on October 6, 1971, five days after PTAR I became effective. Prime Time Access Rule, 23 RR 2d 77 (1971). This waiver has continued in effect through the present season. Prime Time Access Rule Waivers, 31 RR 2d 409 (1974); Prime Time Access Rule, 29 RR 2d 643 (1974).

Opposition to these waivers has been couched in similar terms to the arguments now mounted against the PTAR III exceptions. Thus the waivers have been attacked as creating the potential for abuse, with attendant serious decrease in access time. Experience under the waivers completely rebuts this argument.

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1. See pp. 6-7, supra.

Thus, in its most recent evaluation of the news and public affairs waivers, the Commission stated:

> "It does not appear that there has been any abuse of this waiver, and the networks do, to a large extent use 'their own time' for this purpose. We conclude that, for the period involved here, they should retain the flexibility which the waiver gives them in exercising their journalistic function....
>
> "We have decided not to adopt a numerical limit on network use of this waiver, indicated in the Public Notice as a possibility, since it might impair desirable flexibility and past performance does not indicate a need for it. However, we expect the networks not to abuse this waiver....If the entire burden should not have to fall exclusively in network prime time, neither should it have to fall entirely or largely in access time." Prime Time Access Rule Waivers, 31 RR 2d 409, 417 (1974).[1]

As the Commission pointed out, the PTAR III exceptions thus in large part merely provide "a codification and extension of the existing waiver" which has operated smoothly, and without abuse or threat to the access time concept in the past. Second Report and Order, at 18. With the Commission

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1. Although various parties have attacked virtually every proposed waiver or exception on the ground that the networks could do the programming at issue in "their time," it is clear that the Commission has the discretion to offer the alternatives. See, e.g., James S. Rivers, Inc. (WJAZ) v. FCC, 351 F.2d 194, 196 (D.C. Cir. 1965).

providing continuing ground rules for use of the PTAR III exceptions, it is difficult to comprehend how these exceptions can be viewed as likely to create any significant alteration in the effect of the prime time access rule. The exceptions, like the basic rule, fall well within the discretion of the Commission as defined in Mt. Mansfield, and should be upheld here.

## III. ESTABLISHING SEPTEMBER 1975 AS THE EFFECTIVE DATE OF PTAR III IS A LEGAL AND APPROPRIATE EXERCISE OF THE COMMISSION'S DISCRETION

The FCC has exercised its discretion to provide that the limited changes in the prime time access rule created by PTAR III become effective in September 1975. Not only is this date consistent with the mandate of this Court in NAITPD I, it has also been selected after consideration by the Commission of the comments of various parties on this issue, which was explicitly raised by the Commission's Further Notice of July 17, 1974. The September 1975 effective date, of course, is a reflection of the Commission's concern that implementation of the public interest modification created by PTAR III not be excessively delayed.

A Commission's discretion is particularly broad in ascertaining matters such as the date by which its regulations should be effective. As the United States Court of Appeals for the District of Columbia Circuit has observed:

> "[T]he breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation

of Congressional objectives." Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F.2d 153, 159 (D.C. Cir. 1967).

We submit that the Commission's decision to implement PTAR III in September 1975 reflects a perfectly appropriate balancing judgment. Considering the limited effect on any parties, and the public interest requirement that the benefits of the PTAR III modifications be made available to the viewing public with relative dispatch, the September 1975 date not only is within the Commission's discretion, but virtually is mandated.

In NAITPD I, this Court postponed to September 1975 the Commission's changes in the prime time access rule. As a result, the Court did not reach the merits of the changes.

The Court thus returned the matter to the Commission, having granted the petitions for appeal "to the extent that respondents may not enforce the proposed modifications... prior to September 1975." 502 F.2d at 258. In doing so, the Court suggested that "the Commission may choose to utilize the additional time available to it to reconsider its changes in the rule. Id. at 255 (emphasis added). The clear implication of the Court's opinion therefore was that the Commission had adequate time to reconsider its decision in the time

between this Court's ruling in NAITPD I and a September 1975 effective date.

The Commission did, of course, reconsider its decision. As a result, it decided to make substantially fewer changes than it had in PTAR II, which had been before the Court in NAITPD I.[1] (The limited changes created by PTAR III are discussed in Section II (B), supra.)

At the outset, it should be noted that the September 1975 effective date does not result in "retroactive" application of PTAR III. Compare SEC v. Chenery Corp., 332 U. S. 194 (1947); Atlas Tack Corp. v. New York Stock Exchange, 246 F.2d 311 (1st Cir. 1957). Notice of PTAR III was provided in November 1974; the changes were officially adopted in January 1975. It now is March 1975. September 1975 thus remains six months in the future, and stations may not utilize the changes in the prime time access rule for the broadcast of programs until that date.

Petitioners try to cast PTAR III as a "retroactive"

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1. Thus Petitioner, Sandy Frank, while attacking the September 1975 effective date, concedes in its brief that PTAR III "is a much better rule" than PTAR I would have been (p. 6), and "applauds" the fact that "PTAR III, in the first instance, turns its back on most of PTAR II and returns to the basic provisions of PTAR I." (p. 24)

rule. But this is not the case. The essential argument against the effective date is that implementation of the limited PTAR III modifications in September 1975 does not permit adequate time to prepare network and station schedules and does not give program suppliers adequate time to adjust. The first point is completely irrelevant considering the expedited manner in which this Court is hearing and doubtless will decide this case. This expedition affords adequate lead time to prepare the Fall schedule. This was made clear in the argument to this Court on the Stay Motion where, in effect, the parties conceded that prompt decision would allow adjusting schedules to meet the Court's ruling.

The second point likewise is without merit, because of the long period of time which has been available to program suppliers to evaluate the likely modifications of the prime time access rule and the likelihood of a September 1975 effective date. PTAR III is not a new rule. It is with limited modifications a continuation of PTAR I, already long in effect. The initial adjustments required when the rule first became effective -- involving petitioners' ceasing to program 24 half-hours of prime time which they were then supplying and stations and producers adjusting not only for this but also to comply with the off-network and feature film requirements of the rule -- have already taken place. And

PTAR III does not require any new adjustments since in substantial matter, it continues the status quo.

In fact, PTAR III does not retroactively prohibit producers from doing anything. They are free to sell programs which they produced in the past and which they may produce in the future to networks or stations. The PTAR III changes merely increase to a slight degree the total competition which the producers must face.

Even if it is assumed arguendo that PTAR III would have a peripheral "retroactive" effect as to some few programs already produced prior to the Rule, that circumstance would not invalidate the Commission's selection of an effective date. It is clear that such retroactivity is "not necessarily fatal to its validity." SEC v. Chenery Corp., supra, 332 U.S. at 203. An administrative agency is entitled to utilize even fully retroactive rules if warranted by the public interest. See Id.

In determining the validity of an agency's action in establishing the validity of a truly retroactive rule, several factors are to be considered:

> "(1) Whether the particular case is one of first impression [or overturns a long-standing rule], (2) Whether the new rule represents an abrupt departure from

> well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." Retail, Wholesale and Department Store Union, AFL-CIO v. National Labor Relations Board, 466 F.2d 380, 390 (D.C. Cir. 1972).

In this case, all of the above factors are satisfied by the Commission's selection of an effective date. In other words, even though the new aspects of the Rule at most have only very limited and peripheral retroactive effect, the effective date actually meets the criteria for validating even a truly retroactive rule. Since the date has been made a primary issue at the argument on the motion to stay in this case, and in NAITPD I, we shall elaborate by a brief discussion of such criteria.

1. PTAR III Does Not Alter a Long-Standing Rule: Courts have shown particular concern where an agency's retroactive ruling unexpectedly alters or overturns a regulation of long-standing effect, upon which parties logically relied. See NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966). However, the prime time access rule cannot

be characterized as regulation of this type. PTAR I was expressly stated to be experimental from the outset. See NAITPD I, 502, F.2d at 252. Furthermore, the Commission explicitly stated in 1970 that it would review the question whether documentary and public affairs programs should be exempted from the Rule after the initial Rule had been in effect for a reasonable time, and whether those or other exceptions should be established. Prime Time Access Rule, 19 RR 2d 1869, 1889 (1970).

The current proceeding, explicitly considering at least modification of the rule, has been in progress since 1972. In its 1972 Notice, the Commission explicitly raised the question of whether an exemption might be required for public affairs programming, stating that the question was "particularly important." Radio Regulation **, at 53:491, n. 9 (1972). PTAR II, adopted by the Commission in 1974 as a result of this proceeding, would have provided more sweeping changes than the modifications currently at issue, and gave clear notice of the Commission's general belief that some change was necessary.[1]

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1. The Commission explicitly dealt with the lack of children's documentary and public affairs programs in access time in PTAR II. Prime Time Access Rule, 29 RR 2d 643, 697-98 (1974).

PTAR III thus is merely an adjustment to an experimental rule, which clearly has been under continuing Commission scrutiny. This is the type of situation where even retroactive application is within the Commission's discretion.

2. PTAR III Provides Only Limited Changes: As we have shown previously, PTAR III makes only a minor modification in the prime time rule. This change is considerably less than that which would have been wrought by PTAR II.

PTAR III continues virtually intact the prime time access concept of 14 half-hour access periods per week. The limited changes made are directed at the Commission's well-founded belief that there may well be more of certain types of programs available to viewers if the stations were permitted to take such types of programs from networks without the restrictions of the prime time rule. The Commission has made clear that the exceptions must be used with considerable caution, and that it intends to protect the basic operation of the rule.[1]

PTAR III thus is merely an effort by the Commission "to fill in a void," Retail, Wholesale and Department Store

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1. Similar exceptions and waivers always have been available, and as a result, there has been the potential from the outset for something less than 14 one-half hours to be available as access time.

Union, supra, rather than to create any great change; hence, even retroactive application would be appropriate.

3. There is No Justifiable Reliance on the Unaltered Operation of PTAR I or on an Effective Date Later than September 1975: An essential ingredient in a decision to reject an agency's discretionary decision as to the effective date of a rule is the damage to parties who have justifiably relied on the previous rule. Under the present circumstances, no party should be heard to say that it justifiably believed that there would be no change in PTAR I, or that any change would not come by September 1975.

Whatever surprise might have been created in 1974-4 by PTAR II clearly cannot also be attendant on the adoption of PTAR III in 1974-5. The proceedings in PTAR II, including this Court's decision in NAITPD I, gave all parties notice that substantial changes in the prime time access rule were possible, or even likely. Any prudent individual would be required to keep PTAR II in mind when making his business plans. "Under these circumstances, it cannot be said that no straws were in the wind prior to the issuance of these rules." General Telephone Co. v. United States, 449 F.2d

846, 864 (5th Cir. 1971).[1]

Moreover, PTAR III provides for far less change than PTAR II. Where the change made is merely a limited modification rather than "a reversal of prior policy," only limited weight should be given to a party's retroactivity argument. See General Telephone Co. v. United States, supra, 449 F.2d at 864.

Certain program suppliers argue that they have been developing programs that may have to be scrapped under a September 1975 effective date. The answer to this is four-fold:

-- First, it is difficult to imagine how the limited exceptions in PTAR III bring about any significant change in the prospects of any producers. No showing of harm has been made and indeed in the argument on the Motion to Stay, those who argued for the the Stay

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1. Options for programs running in access time frequently need not be exercised by stations before February or March. Thus regardless of the rule, there still is uncertainty as to whether certain programs will continue to receive station clearance. Actual production of episodes for viewing next Fall rarely will begin before April, and for at least certain quiz or game shows, may not begin until August.

appeared to concede that an expedited order would largely solve any problem.

-- Second, in light of the Commission's determination in PTAR II, no reasonable person justifiably would be developing programs without considering the likelihood of a modification in access time.

-- Third, the only alleged program development that would be at all relevant on this point would be that limited amount that possibly might have occurred prior to the Commission's Public Notice of November 15, 1974 which promulgated the essential elements of PTAR III.[1]

-- Fourth, the September 1975 date was clearly indicated by the decision of this Court itself

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1. Petitioners' awareness of PTAR III at least as early as November 18, 1974 is seen in a trade press report quoting petitioners with respect to PTAR III, as follows:

> "Principal winner apparently is National Association of Independent Television Producers...Giraud Chester, Chairman of NAITPD said organization is 'gratified'...However, he also expressed concern about some exemptions, and said organization would await Commission 'clarification' before determining its position." Broadcasting, November 18, 1974, at 4; see Variety, November 20, 1974, at 27, 42.

in NAITPD I. 502 F.2d at 255. In light of this, and the Commission's indication that parties should comment on the effective date issue of November 19, 1974, there was certainly a substantial likelihood that September 1975 was to be the date of any changes in PTAR I which the parties could not justifiably ignore.

4. The September 1975 Effective Date Places No Substantial Burden On Any Party: With notice of likely change dating back as far as PTAR II, and with specific notice of PTAR III coming in November 1974, coupled with the essential preservation in PTAR III of the original access period, there can be little burden on program suppliers regarding abortive program development. And as was essentially conceded in the arguments on the Motion to Stay, with expeditious determination ordered by the Court of the present case, there will be ample time to prepare program schedules for the Fall, 1975 season.

5. There Is a Public Interest Need For Application of the New Rule Without Excessive Delay: The modifications made by PTAR III, in large part, aim at providing a greater supply of programming of undisputed public interest. As we

have discussed previously, it is not disputed that children's programs, documentaries and public affairs programs are in the public interest and that broadcast licensees have an obligation to provide adequate amounts of these types of programs. In such case, it is surely within the discretionary power of the Commission to determine that where its regulation has tended to limit programming of these types that situation should be remedied without excessive delay.

In sum, PTAR III is not retroactive -- but to the extent that there are any retroactive effects at all, they are at most minimal and were known by all parties in advance. Where, as here, there has been notice to all concerned, where the changes in the Rule created by PTAR III are only limited ones, and where there is no legitimately claimed harm to any party flowing from a September 1975 effective date -- to delay the implementation of PTAR III still further cannot possibly be justified.

## CONCLUSION

For the above reasons, it is respectfully submitted that the Commission's Order under review should be upheld.

Respectfully submitted,

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March 3, 1975

## CERTIFICATE OF SERVICE

I, Deena J. Schneider, hereby certify that on this 3rd day of March, 1975, I served copies of the foregoing BRIEF and EXHIBIT TO BRIEF FOR INTERVENOR NATIONAL BROADCASTING COMPANY, INC., on the following persons by depositing same in the United States Mail, postage prepaid and addressed as follows:

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